No. DA 21-0552

IN THE SUPREME COURT OF THE STATE OF MONTANA

STEPHANIE KIPFINGER, BEN CUNNINGHAM, Individually and as Natural Guardian and Next Friend of E.C., a Minor,

Plaintiffs–Appellants,

v.

GREAT FALLS OBSTETRICAL & GYNECOLOGICAL ASSOCIATES, and JULIE KUYKENDALL,

Defendants–Appellees.

On Appeal from the Cascade County District Court
Cause No. ADV-17-0699(b)
The Honorable Elizabeth A. Best

APPELLANTS' REPLY BRIEF

Daniel J. Flaherty
FLAHERTY GALLARDO LAW OFFICE
1026 1st Avenue South
P.O. Box 1968
Great Falls, Montana 59403
Telephone: (406) 727-8494
Facsimile: (406) 727-8537
daniel@greatfallsfirm.com

Michael L. Brooks
THE BROOKS LAW FIRM
7100 N. Classen Blvd., Suite 300
Oklahoma City, Oklahoma 73116
Telephone: (405) 840-1066
Facsimile: (405) 843-8446
michael.brooks@brookslawok.com

Attorneys for Appellants

(Additional Counsel Listed on Inside Cover)

August 24, 2022

Nicholas C. Rowley
Benjamin R. Novotny
TRIAL LAWYERS FOR JUSTICE
421 West Water Street, 3rd Floor
Decorah, Iowa 52101
Telephone: (563) 382-5071
Facsimile: (888) 801-3616
nick@tl4j.com
ben@tl4j.com

William V. Ballew, III
BALLEW LEGAL, P.C.
530 Highland Park Dr.
Missoula, Montana 59803
Telephone: (406) 414-9546
Facsimile: (406) 414-9549
will@ballewlegal.com

Attorneys for Appellants

Counsel for Appellees:

Gary D. Kalkstein
Joe J. Newman
KALKSTEIN LAW FIRM, P.C.
225 N. Adams
P.O. Box 8568
Missoula, Montana 59807-8568
Telephone: (406) 721-9800
Facsimile: (406) 721-9896
gary@kalksteinlaw.com
joe@kalksteinlaw.com

Table of Contents

Table of Authorities

Cases

Introduction

Despite Defendants' obsessive focus on the parents' district-court briefing, resolution of this appeal turns on a single, straightforward question: Did the district court err in concluding that Dr. Harlass's opinions were legally insufficient to create a genuine issue of material fact as to whether Dr. Kuykendall committed at least one violation of the standard of care?

Defendants raise the subsidiary question of what materials the Court should consider in resolving this issue: (1) only the materials submitted by the parties with their summary-judgment briefs—i.e., Dr. Harlass's report and a few pages of deposition excerpts; or (2) the parties' summary-judgment materials plus the portions of Dr. Harlass's deposition testimony that the district court considered sua sponte. Because the district court relied on Dr. Harlass's complete deposition in granting summary judgment, the parents addressed the entirety of Dr. Harlass's testimony in their appellate brief. But the correct outcome would not change if this Court were to confine its review to the materials submitted by the

parties. Either way, the evidence requires reversal of summary judgment.

I. The parents cited the correct standard of review and showed that the district court committed reversible error.

Defendants criticize the parents for citing only the de novo standard of review and not arguing that the district court abused its discretion. But as Defendants acknowledge, the district court's ruling was based on a pure issue of law—the legal sufficiency of Dr. Harlass's opinions. When a district court's rationale for excluding expert testimony "is based on a conclusion of law," this Court "review[s] such a conclusion de novo." *Howlett. v. Chiropractic Center, P.C.*, 2020 MT 74, ¶ 15, 399 Mont. 401, 460 P.3d 942.

Even if the abuse-of-discretion standard were applicable, the parents' failure to cite that standard would not undermine their argument for reversal. The parents fully explained why the district court's ruling reflected an incorrect interpretation of Dr. Harlass's testimony. That is sufficient to establish reversible error. *See Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, ¶¶ 36–42, 367 Mont. 21, 289 P.3d 131.

II. The parents' appellate arguments directly respond to the district court's rationale for granting summary judgment, which was based on an argument never raised by Defendants and evidence outside the record created by the parties.

Defendants contend that the Court should refuse to consider all the parents' arguments regarding Dr. Harlass's complete deposition because the parents did not raise these arguments below or attach Dr. Harlass's entire deposition transcript to their summary-judgment briefing. Defendants strive to create the impression that they fully briefed the legal sufficiency of Dr. Harlass's standard-of-care opinions, the parents offered no meaningful response, and the district court tried to save the parents by seeking out favorable evidence in Dr. Harlass's deposition. That is not what happened.

As explained below, Defendants contested the legal sufficiency of just one of Dr. Harlass's standard-of-care opinions, and they did so only through an improper new argument in their reply brief. Defendants never argued that Dr. Harlass's deposition testimony somehow undermined every standard-of-care opinion in his report. Yet the district court granted summary judgment on

that ground without giving the parents an opportunity to address the court's rationale.

In their summary-judgment brief, Defendants focused almost entirely on their agency and causation theories. (*See generally* Br. Supp. Defs.' Mot. for Summ. J., June 30, 2021.) Defendants devoted a scant two paragraphs to the argument that the parents lacked sufficient evidence to establish that Dr. Kuykendall violated the standard of care. (*Id.* at 4–5.) And in those two paragraphs, Defendants did not mention Dr. Harlass's opinions at all. (*Id.*) Defendants argued only that certain allegations in the parents' complaint conflicted with the claim that Dr. Kuykendall departed from the standard of care by failing to ensure the attendance of appropriate personnel at delivery. (*See id.* at 5.) Nothing about Defendants' summary-judgment brief put the parents on notice that Defendants were even contesting the legal sufficiency of Dr. Harlass's standard-of-care opinions, let alone that the parents needed to respond with an exhaustive analysis of Dr. Harlass's deposition testimony on each discrete opinion.

In their response brief, the parents addressed the arguments actually raised by Defendants. (*See generally* Pls.' Opp'n to Defs.' Mot. for Summ. J., Aug. 16, 2021.) The parents referenced Dr. Harlass's opinion that Dr. Kuykendall should have performed the C-section no later than 3:20 p.m., and they attached both Dr. Harlass's report and deposition excerpts concerning that opinion. (*Id.* at 6; Pls.' Statement of Disputed Facts, Fact No. 7, Aug. 16, 2021; Report of Frederick E. Harlass, M.D., Jan. 30, 2020 (attached as Ex. 3 to Pls.' Statement of Disputed Facts) [hereinafter Harlass Report]; Harlass Dep. 186–87 (attached to Pls.' Statement of Disputed Facts).)

In their reply, Defendants argued—for the first time—that Dr. Harlass's opinion about delivery attendance was inadmissible. (*See* Defs.' Reply Br. in Support of Mot. for Summ. J. 7–9 & Ex. B, Sept. 10, 2021.) Asserting this argument in a reply was wholly improper, as the argument did not address any new matter raised in the parents' response brief. *See Kapor v. RJC Inv., Inc.*, 2019 MT 41, ¶ 29, 394 Mont. 311, 434 P.3d 869. Defendants did not challenge any of Dr. Harlass's other standard-of-care opinions.

As the foregoing demonstrates, Defendants did not fairly raise the legal sufficiency of Dr. Harlass's standard-of-care opinions as an issue for summary judgment. It is hardly surprising, then, that the parents did not attach Dr. Harlass's entire deposition transcript or develop a comprehensive legal-sufficiency argument about each of Dr. Harlass's opinions.

After the summary-judgment briefing was completed, the district court requested Dr. Harlass's complete deposition transcript, which the parents promptly provided. (*See* Pls.' Mot. for Leave to Supp. Record, Ex. A, Jan. 13, 2022.)

Three days later, the district court granted summary judgment for Defendants. (*See* Order on Defs.' Mot. for Summ. J., Sep. 27, 2021.) The court went beyond the record created by the parties and adopted a theory Defendants never argued. Specifically, the court relied on deposition testimony not presented by any party to conclude that Dr. Harlass backed off every standard-of-care opinion listed in his report. (*See id.* at 8.) The court did not hold a hearing or order supplemental briefing before granting summary judgment on this ground.

The parents do not doubt that the district court endeavored to treat them fairly. But the court granted summary judgment against the parents on a ground not raised by Defendants without giving the parents advance notice or an opportunity to refute the court's reasoning. That alone warrants reversal. *See Tags Realty, LLC v. Runkle*, 2015 MT 166, ¶ 10, 379 Mont. 416, 352 P.3d 616.

At a minimum, the parents must be allowed to contest the district court's rationale. The rule against considering arguments raised for the first time on appeal rests on the principle that "it is unfair to fault the trial court on an issue it was never given an opportunity to consider." *State v. Montgomery*, 2010 MT 193, ¶ 11, 357 Mont. 348, 239 P.3d 929 (internal quotation mark omitted). There is no "fundamental unfairness" to the district court, where, as here, the court not only had the opportunity to consider the issue, but in fact ruled on the issue. *See id.* ¶ 13 (holding that it would be "unduly harsh" to prevent party from arguing issue that district court had opportunity to address and arguably ruled on).

Defendants have cited no case to support the nonsensical proposition that a party cannot challenge a district court's stated

basis for its ruling. Such a rule would be particularly harsh and unfair here, where neither Defendants nor the district court put the parents on notice of the need to present detailed arguments regarding Dr. Harlass's entire deposition.

III. As stated in his report, Dr. Harlass's opinions create a genuine issue of material fact regarding multiple violations of the standard of care by Dr. Kuykendall.

Defendants assert that every standard-of-care opinion in Dr. Harlass's report fails the "more likely than not" test. Defendants' arguments are as misguided as they are perfunctory.

At the outset, it is important to note some basic principles concerning expert testimony that Defendants completely ignore. "District courts should construe liberally the rules of evidence so as to admit all relevant expert testimony." *McClue v. Safeco Ins. Co. of Ill.*, 2015 MT 222, ¶ 23, 380 Mont. 204, 354 P.3d 604 (internal quotation marks omitted). Except in rare cases involving "novel scientific evidence," it is not a district court's role to assess the reliability of expert opinions. *See id.* ¶¶ 21–22. Rather, once a district court has determined that an expert is qualified in a recognized field that is relevant to the case, the court should

"leav[e] to the jury whether the qualified expert reliably applied the reliable field to the facts." *Id.* ¶ 22 (internal quotation marks omitted). The proper way to challenge "shaky" expert testimony is through "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Id.* ¶ 23 (quotation omitted).

Turning to Defendants' arguments, recall that Dr. Harlass's report lists 12 "deviations from the standard of care." (*See* Harlass Report 2–3.) According to Defendants, the parents are wrong in their assertion that eight of these criticisms apply to Dr. Kuykendall. Defendants claim that criticisms 10, 11, and 12 are not directed at Dr. Kuykendall. This reading of the report is untenable.

Dr. Kuykendall was the attending OB/GYN and the person who called the C-section. It defies credulity to suggest that criticism 10 concerning the timing of the C-section is somehow not directed at her. Criticism 11 concerns discontinuing the oxytocin that Dr. Kuykendall ordered. The only reasonable interpretation of the report is that the criticism applies to the physician who ordered the oxytocin and had authority to discontinue her order. As for

criticism 12, Defendants simply ignore the last line: "It was both *Dr. Kuykendall's* and the nurses responsibility to ensure appropriate attendance at delivery." (Harlass Report at Care Critique 12 (emphasis added).)

Defendants argue that criticisms 3, 7,[1] and 8 are "equivocally" directed at the hospital and thus fail the "more likely than not" test under *Brookins v. Mote*, 2012 MT 283, 367 Mont. 193, 292 P.3d 347. (Appellees' Resp. Br. 22.) This argument reflects a fundamental misunderstanding of "equivocation."

In *Brookins*, a negligent-credentialing case, the expert testified that the chair of a hospital's medical staff "perhaps" had an obligation to determine the malpractice history of a physician applying for staff privileges. *Id.* ¶ 68. This Court held that such "equivocal testimony" did not establish a standard of care; rather, "it merely establishe[d] that the expert was not certain of the standard, but that it was possible that the medical staff had an obligation they did not fulfill." *Id.*

[1] The parents withdraw criticism 7 concerning the failure to perform the C-section within 30 minutes and no longer rely on this opinion as a basis for opposing summary judgment.

Brookins correctly used the term "equivocal" to describe testimony that did no more than identify what the standard of care might require. Here, Dr. Kuykendall misuses the term to refer to any standard-of-care criticism—no matter how definitive—directed at more than one person. Dr. Harlass did not write that the physician *possibly* violated the standard of care or that the nursing staff *possibly* violated the standard of care; he wrote that both *did* violate the standard of care. Put differently, Dr. Harlass unequivocally opined that the physician and nursing staff were both negligent.

Defendants next claim that criticism 4—Dr. Kuykendall failed to place a fetal scalp lead in the presence of fetal heart rate abnormalities—is irreconcilable with criticism 5—the nurses failed to notify Dr. Kuykendall of the need for a fetal scalp lead. But these opinions are easily reconcilable. While the nurses should have told Dr. Kuykendall that a fetal scalp lead was necessary, she should have interpreted the fetal heart tracings and recognized the need for a fetal scalp lead irrespective of what the nurses told her.

Even if the opinions were irreconcilable, however, that would be an issue for cross-examination rather than a basis for exclusion. In *McClue*, a neurology expert opined that a car crash caused the plaintiff's ALS, but he also admitted that the cause of ALS was unknown. *Id.* ¶ 18. The district court excluded the expert's opinion based on these contradictory statements. *Id.* This Court reversed, explaining that the district court "misinterpret[ed] its role" by assessing the reliability of the expert's opinion instead of leaving that issue to the jury. *Id.* ¶ 22. The Court noted that the defense could use the expert's inconsistent admission on cross-examination. *Id.* ¶ 26.

McClue's reasoning applies here. Defendants are free to argue at trial that Dr. Harlass's opinions are inconsistent, but any alleged inconsistencies do not justify excluding Dr. Harlass's testimony.

Defendants' final challenge to Dr. Harlass's report is beyond trivial. Defendants claim that the parents "concede [that criticism 6] was erroneously written"—referring to the typo where Dr. Harlass wrote Category III when he meant Category II. (*See* Appellees' Resp. Br. 22.) Not surprisingly, Defendants offer no

argument or authority to support the absurd proposition that a typo in a report renders an expert's opinion inadmissible.

IV. As expounded in his deposition, Dr. Harlass's opinions create a genuine issue of material fact regarding multiple violations of the standard of care by Dr. Kuykendall.

Defendants raise numerous challenges to Dr. Harlass's deposition testimony on each of his opinions. Defendants' arguments misconstrue Dr. Harlass's testimony or go to weight rather than admissibility.

A. Dr. Kuykendall violated the standard of care by failing to place a fetal scalp electrode.

Relying on *Brookins v. Mote*, 2012 MT 283, 367 Mont. 193, 292 P.3d 347, Defendants contend that Dr. Harlass's opinion about the need for a fetal scalp electrode is impermissibly conditional because Dr. Harlass testified that the electrode would not have been required if Dr. Kuykendall believed that the fetal heart tracing was clearly Category II and not Category I or III. *Brookins* materially differs from this case.

In *Brookins*, the expert listed several concerning issues about a doctor that, if known to the hospital, would render the hospital's

decision to grant privileges to the doctor a violation of the standard of care. *Id.* ¶ 66. The expert also testified, however, that without a copy of the hospital bylaws and the doctor's credentialing file, he could not render an opinion about whether the hospital violated the standard of care. *Id.* This Court correctly held that the expert's testimony established only that the expert "had not been provided with adequate information to offer an opinion as to whether the Hospital had breached its duty." *Id.*

Here, by contrast, Dr. Harlass stated in his report that Dr. Kuykendall violated the standard of care by failing to place a fetal scalp lead. (Harlass Report at Care Critique 5.) Then, in response to a deposition question about whether a fetal scalp electrode is *always* required with a Category II tracing, Dr. Harlass identified a hypothetical scenario where an electrode would not have been required—if Dr. Kuykendall were certain that the tracing was Category II. (Harlass Dep. 160:25–161:13.) There is no evidence that Dr. Kuykendall had such certainty. Thus, unlike the expert in *Brookins*, Dr. Harlass did not lack adequate information to form his

opinion. Rather, he reasonably based his opinion on the absence of a particular fact.

Defendants also make the same irreconcilability argument that they made concerning this opinion in Dr. Harlass's report. The parents debunked this argument above and will not rehash the analysis here. (*See supra* pp. 11–12.)

Finally, Defendants claim that Dr. Harlass conceded that the decision to place a fetal scalp electrode is a hospital-specific matter; thus, his opinion is not based on a national standard of care. Defendants misstate Dr. Harlass's testimony. Dr. Harlass testified that whether a *nurse* (not just a physician) can decide to place a fetal scalp lead depends on a hospital's "nursing protocols" and "is a hospital specific matter." (Harlass Dep. 247:19–248:14.) Dr. Harlass in no way suggested that Dr. Kuykendall's duty to place a scalp lead depended on the hospital's nursing policies rather than a national standard of care.

B. Dr. Kuykendall violated the standard of care by starting oxytocin in the face of a Category II fetal heart tracing.

Defendants rely on *Brookins* again, this time arguing that Dr. Harlass's opinion about starting oxytocin in the face of a Category II fetal heart tracing is impermissibly conditional because Dr. Harlass testified that it would have been acceptable to start oxytocin if the physician knew that the tracing was Category I. The flaw in Defendants' argument is even more apparent on this issue.

After Dr. Harlass testified that it violates the standard of care to start oxytocin with a Category II tracing, defense counsel asked whether this is an across-the-board rule—i.e., whether there are exceptions. Dr. Harlass identified one "caveat"—if the physician clearly determines that the tracing is really Category I. Dr. Harlass explained that a physician would make this determination by placing a fetal scalp lead. (Harlass Dep. 163:21–164:11, 165:05–18.) It is undisputed that Dr. Kuykendall did not place a scalp lead and determine that the tracing was actually Category I. Thus, Dr. Harlass's opinion rests on undisputed facts, not unproven conditions.

Defendants' next attacks on this opinion are confusing, but they seem to hinge on the viability of Defendants' challenges to Dr. Harlass's opinion about placing a fetal scalp lead. As shown above, those challenges lack merit. (*See supra* § V.A.)

Defendants also contend that Dr. Harlass's opinion is based on the hospital's protocol rather than a national standard of care. Again, Defendants misconstrue Dr. Harlass's testimony. Dr. Harlass simply identified the hospital's protocol as literature that supported his opinion. (Harlass Dep. 164:12–165:04.) He never suggested that his opinion was based purely on the hospital's protocol rather than a national standard of care. A medical expert's testimony does not become inadmissible merely because the expert testifies that a hospital protocol reflects the standard of care or supports the expert's statement of the standard of care. *Cf. Horn v. St. Peter's Hosp.*, 2017 MT 298, ¶¶ 25–26, 389 Mont. 449, 406 P.3d 932 (recognizing that expert could have established standard of care by testifying that device manufacturer's recommendation and package insert reflected standard of care).

Defendants end with a laundry list of conclusory arguments that either misstate Dr. Harlass's testimony or are irrelevant. Only one concerns an issue of admissibility rather than a point for cross-examination. Defendants claim that because "Dr. Harlass framed the opinion as a personal preference at least once," the opinion is impermissibly based on Dr. Harlass's personal practice rather than a national standard of care. (Appellees' Resp. Br. 30.)

If Dr. Harlass testified *only* to his personal practice and never identified the standard of care, Defendants' argument would have merit. But Dr. Harlass plainly stated the applicable standard of care and then referenced a personal practice consistent with that standard. This Court has recognized that a physician's personal practice may itself be relevant evidence when based on a national standard. *See Norris v. Fritz*, 2012 MT 27, ¶ 44, 364 Mont. 63, 270 P.3d 79 ("A physician's individual practice, *when not based on national standards*, lacks relevance to a medical malpractice case." (emphasis added)). Thus, an expert's reference to a personal practice that comports with the standard of care cannot possibly constitute a basis for excluding the expert's testimony.

C. Dr. Kuykendall violated the standard of care by failing to discontinue the oxytocin by 3:20 p.m.

Defendants argue that Dr. Harlass's opinion about discontinuation of oxytocin is not directed at Dr. Kuykendall. The parents already explained why this reading of Dr. Harlass's report is unreasonable. (*See supra* p. 9.) Even if the report were unclear, however, Dr. Harlass explicitly criticized Dr. Kuykendall in his deposition. (*See* Harlass Dep. 122:06–17.)

Defendants also complain that Dr. Harlass testified that Dr. Kuykendall "should" have discontinued the oxytocin instead of testifying that her "failure to do so was a violation of a national standard of care." Defendants claim that they are not making a "magic words" argument, but they are doing exactly that.

Dr. Harlass made clear in both his report and deposition that his opinions were based on national standards of care with which he was familiar by virtue of his education, training, and experience. (*See* Appellants' Opening Br. 16–17.) And in his report, Dr. Harlass specifically identified Dr. Kuykendall's failure to discontinue the oxytocin as a "deviation[] from the standard of care." (Harlass Report at Care Critique 11 & p. 3.) Defendants ignore all this and

instead focus on the absence of the words "national standard of care" from Dr. Harlass's limited deposition testimony on this issue. Defendants' approach cannot be reconciled with this Court's admonition "not [to] let scrutiny of an expert's phrasing cloud the substantive appraisal of their testimony." *See Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, ¶ 37, 367 Mont. 21, 289 P.3d 131.

Finally, Defendants make a personal-practice argument that fails for the same reason as their similar argument concerning Dr. Harlass's prior opinion. (*See supra* p. 18.)

D. Dr. Kuykendall violated the standard of care by failing to call the C-section by 3:20 p.m.

Once again, Defendants argue that Dr. Harlass's opinion about when the C-section should have been called is not directed at Dr. Kuykendall. And once again, Defendants' interpretation of Dr. Harlass's report is untenable. (*See supra* p. 9.)

Defendants also make the same "magic words" argument about "national standard of care" that they made concerning Dr.

Harlass's prior opinion. The argument fails here for the same reasons stated above. (*See supra* pp. 19–20.)

Lastly, Defendants argue that this opinion is "fatally irreconcilable" with the allegations in the First Amended Complaint that "a team to intubate the baby was not available" and that "a neonatologist was not available to attend the delivery." (Appellees' Resp. Br. 34 (quoting 1st Am. Compl. ¶ 69, Oct. 25, 2018).) This argument misses the mark for three reasons.

First, Defendants simply assume—with no analysis whatsoever—that the cited allegations are binding judicial omissions. But determining whether allegations in a pleading constitute judicial admissions requires a court to consider a multi-part test and exercise discretion based on the relevant circumstances. *See Bilesky v. Shopko Stores Operating Co.*, 2014 MT 300, ¶¶ 10–14, 338 P.3d 76, 377 Mont. 58. The allegations here do not qualify. They appear in Count III of the First Amended Complaint, which asserts a gross-negligence claim against Benefis, not Count VI, which asserts a negligence claim against Defendants. (*See* 1st Am. Compl. 8–10.) Because a party may plead alternative

and inconsistent claims, an allegation made in relation to one claim does not constitute a judicial admission in connection with a separate claim. *See Bilesky* ¶¶ 25–27.

Second, regardless of whether the allegations are judicial admissions, they are not irreconcilable with Dr. Harlass's opinion. Defendants fail to explain how the opinion that Dr. Kuykendall should have called the C-section at 3:20 p.m. conflicts with the allegations that a NICU team and neonatologist were not available when E.C. was delivered.

Third, even if the allegations were judicial admissions and were irreconcilable with Dr. Harlass's opinion, the conflict would not justify excluding Dr. Harlass's opinion. Rather, it would present an issue for on cross-examination. (*See supra* p. 12 (discussing *McClue*).)

E. Dr. Kuykendall violated the standard of care by failing to ensure that a provider who was capable and experienced with neonatal intubation attended the delivery to resuscitate E.C.

Defendants reassert their judicial-admissions theory, arguing that allegations in the parents' complaint conflict with Dr.

Harlass's opinion about delivery attendance. This time, Defendants rely on the parents' allegations that the need to intubate became apparent during the C-section, a team to intubate was not available, and a neonatologist was not available. Defendants' argument fails for the same three reasons as its similar argument concerning the timing of the C-section. (*See supra* pp. 21–22.)

Rather than rehash the entire analysis from above, the parents will limit discussion here to Defendants' incorrect assertion of inconsistency. The fact that the *actual* need for intubation was unknown before the C-section is entirely consistent with the opinion that a neonatal provider should have been present at delivery given the *potential* need for intubation. (*See* Harlass Dep. 140:06–07, 142:25–143:01.) Similarly, the fact that a *team* and *neonatologist* were unavailable does not conflict with the opinion that *some provider* should have been there for neonatal intubation. RT Jim Eksted, who ultimately responded, was an appropriate provider. The problem was that he was called during the procedure and did not arrive until eight minutes after delivery. (*See* Appellants' Opening Br. 7; Harlass Dep. 140:13–18.)

Defendants also contend that Dr. Kuykendall met the standard of care because the provider who ultimately intubated E.C.—CRNA Darrin Dixon—was present the entire delivery. This argument represents a disagreement with Dr. Harlass's conclusion that CRNA Dixon's presence did not satisfy the standard of care rather than a challenge to the legal sufficiency of Dr. Harlass's opinion. If Defendants believe that the last-ditch effort by the mother's CRNA undermines Dr. Harlass's opinion, they can make that dubious argument to the jury.

Defendants next argue that Dr. Harlass's opinion rests on Benefis's Delivery Attendance Policy rather than a national standard of care. Wrong. In his report, Dr. Harlass criticized both Dr. Kuykendall's general failure to have a neonatal intubator present at delivery and her specific failure to secure the attendance of the neonatal team required by Benefis's policy. (*See* Harlass Report at Care Critiques 8 & 12.) These criticisms were lumped together in the limited discussion of the delivery-attendance issue in Dr. Harlass's deposition, hence the references to the policy. (*See* Harlass Dep. 140:02–143:02.) But Dr. Harlass ultimately clarified

that the more general criticism most accurately reflects the standard of care. Specifically, Dr. Harlass testified that no national standard of care dictates the particular type of neonatal provider who must attend deliveries like E.C.'s. That is a matter of hospital policy. What the standard of care does require, however, is that *some* qualified provider be present for neonatal intubation. (*See* Appellants' Opening Br. 24–27.)

Benefis's policy required delivery attendance by a complete neonatal response team. (*See* Delivery Attendance Policy 1 (attached to Pls.' Statement of Disputed Facts).) But Dr. Harlass recognized that just having RT Eksted at the delivery would have satisfied the standard of care. (*See* Harlass Dep. 140:13–18.) Thus, Dr. Harlass's opinion is obviously not based on the policy.

Finally, Defendants contend that the following line in Dr. Harlass's deposition demonstrates that his opinion is based on possibilities rather than probabilities: "Whether at the discretion of the nurse, the doctor, or both, per the protocol, there should have been somebody there that could intubate." (Appellees' Resp. Br. 39 (quoting Harlass Dep. 139:23–141:2).) According to Defendants, Dr.

Harlass equivocated about Dr. Kuykendall's responsibility for ensuring the attendance of an appropriate neonatal provider at delivery, indicating that the onus might fall solely on nursing.

Defendants' position requires improperly construing Dr. Harlass's statement in isolation. *See Beehler*, ¶¶ 36–39 (holding that expert's use of the words "rare times rare," "speculate," and "suspicion" did not warrant exclusion of testimony where entire opinion reflected sufficient probability). In context, the only reasonable interpretation of Dr. Harlass's statement is that *both* Dr. Kuykendall and the nursing staff were required by their respective standards of care to ensure the attendance of a neonatal intubator at delivery, and either Dr. Kuykendall, a nurse, or both needed to follow through on their obligation to avoid the critical delay in intubation.

The relevant context includes Dr. Harlass's report, where he twice stated that both Dr. Kuykendall and the nurses were responsible for ensuring that an appropriate neonatal provider attended the delivery. (*See* Harlass Report at Care Critiques 8 & 12.)

The relevant context also includes the entire colloquy in which Dr. Harlass made the statement singled out by Defendants. Two parts of the exchange demonstrate that the statement does not reflect equivocation about Dr. Kuykendall's obligation.

First, Dr. Harlass made the statement immediately after referencing "differences of opinion" about whether Dr. Kuykendall affirmatively prevented nursing from calling the NICU. (*See* Harlass Dep. 140:06–141:02.) This explains Dr. Harlass's "whether at the discretion" phrasing. He was indicating that it was irrelevant whether Dr. Kuykendall, nursing, or both decided not to call the NICU. Both were responsible for ensuring appropriate attendance at delivery, and neither did so.

Second, near the end of the discussion, Dr. Harlass asked if defense counsel wanted to know whether there "was anything that [Dr. Kuykendall] did or did not do that was below the standard of care." (Harlass Dep. at 142:18–21.) Defense counsel said yes, "[a]t the time of delivery, once the baby is delivered." (*Id.* at 142:22–23.) Dr. Harlass started to affirm the opinion in his report that Dr. Kuykendall violated the standard of care by failing to call for an

appropriate neonatal provider to attend the C-section, but defense counsel interjected and clarified that he was asking only about post-delivery criticisms. (*See id.* at 142:24–143:06.)

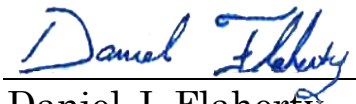
The statements in Dr. Harlass report and the full context surrounding the testimony cherry-picked by Defendants make clear that Dr. Harlass never intended to suggest that Dr. Kuykendall might not be responsible for ensuring appropriate attendance at delivery.

Conclusion

Regardless of whether this Court limits its review to the evidence presented by the parties or also considers Dr. Harlass's complete deposition, Dr. Harlass's opinions are sufficient to create a genuine issue of material fact as to Dr. Kuykendall's negligence. The parents respectfully request that this Court reverse the district court's summary-judgment order.

August 24, 2022

Respectfully submitted,



Daniel J. Flaherty
FLAHERTY GALLARDO LAW OFFICE
1026 1st Avenue South
P.O. Box 1968
Great Falls, Montana 59403
Telephone: (406) 727-8494
Facsimile: (406) 727-8537
daniel@greatfallsfirm.com

– and –

Michael L. Brooks
THE BROOKS LAW FIRM
7100 N. Classen Blvd., Suite 300
Oklahoma City, Oklahoma 73116
Telephone: (405) 840-1066
Facsimile: (405) 843-8446
michael.brooks@brookslawok.com

– and –

Nicholas C. Rowley
Benjamin R. Novotny
TRIAL LAWYERS FOR JUSTICE
421 West Water Street, 3rd Floor
Decorah, Iowa 52101
Telephone: (563) 382-5071
Facsimile: (888) 801-3616
nick@tl4j.com
ben@tl4j.com

– and –

William V. Ballew, III
BALLEW LEGAL, P.C.
530 Highland Park Dr.
Missoula, Montana 59803
Telephone: (406) 414-9546
Facsimile: (406) 414-9549
will@ballewlegal.com

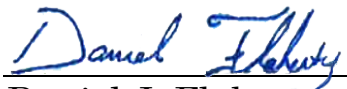
Attorneys for Appellants

Certificate of Compliance with Rule 11

1. This brief complies with the typeface and text-style requirements of M. R. App. P. 11(2) because this brief has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook style.

2. This brief complies with the line-spacing requirements of M. R. App. P. 11(3)(b) because the brief is double spaced, except for footnotes and quoted and indented material.

3. This brief complies with the type-volume limitation of M. R. App. P. 11(4)(a) because this brief contains 4,983 words, excluding the parts of the brief exempted by M. R. App. P. 11(4)(d).



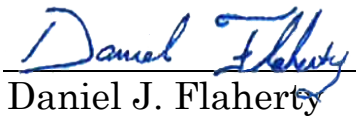
Daniel J. Flaherty

Certificate of Service

I hereby certify that on the 24th day of August 2022, I served a true and correct copy of Appellants' Reply Brief via U.S. Mail on the following:

Gary D. Kalkstein
Joe J. Newman
KALKSTEIN LAW FIRM, P.C.
225 N. Adams
P.O. Box 8568
Missoula, MT 59807-8568
Telephone: (406) 721-9800
Facsimile: (406) 721-9896
gary@kalksteinlaw.com
joe@kalksteinlaw.com

Attorneys for Appellees



Daniel J. Flaherty

CERTIFICATE OF SERVICE

I, Patrick F. Flaherty, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 08-24-2022:

William V. Ballew (Attorney)
530 Highland Park Drive
Missoula MT 59801
Representing: Ben Cunningham, Stephanie Kipfinger
Service Method: eService

Paul Gallardo (Attorney)
1026 1st Avenue South
Great Falls MT 59401
Representing: Ben Cunningham, Stephanie Kipfinger
Service Method: eService

Joe J. Newman (Attorney)
225 N Adams St
Missoula MT 59801
Representing: Great Falls Obstetrical and Gynecological Associates, Julie Kuykendall
Service Method: eService

Gary Darling Kalkstein (Attorney)
P.O. Box 8568
225 N Adams
Missoula MT 59807-856
Representing: Great Falls Obstetrical and Gynecological Associates, Julie Kuykendall
Service Method: eService

Daniel J. Flaherty (Attorney)
P.O. Box 1968
Great Falls MT 59403
Representing: Ben Cunningham, Stephanie Kipfinger
Service Method: Conventional

Benjamin Novotny (Attorney)
421 West Water Street, Third Floor
Decorah IA 52101
Representing: Ben Cunningham, Stephanie Kipfinger
Service Method: Conventional

Electronically signed by Adam Gardner on behalf of Patrick F. Flaherty
Dated: 08-24-2022